

Before the  
Administrative Hearing Commission  
State of Missouri



MARK A. FUNK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10-0213 AF
	)	
MISSOURI REAL ESTATE	)	
APPRAISERS COMMISSION,	)	
	)	
Respondent.	)	

**DECISION**

We grant petitioner Mark A. Funk’s (“Funk”) attorney fees and costs.

**Procedure**

On August 14, 2007, the Missouri Real Estate Appraisers Committee (“MREAC”) informed Funk that MREAC had denied his application for a real estate appraiser’s license. On September 12, 2007, Funk, acting *pro se*, filed a complaint with this Commission. On November 5, 2008, this Commission granted Funk’s application for a license. On December 4, 2008, MREAC filed a petition for judicial review in the Cole County Circuit Court. Funk employed counsel Michael Edgett (“Edgett”) to defend against that suit. On May 4, 2009, the Cole County Circuit Court reversed this Commission’s decision. Funk, represented by Edgett, appealed to the Missouri Court of Appeals, Western District. On January 12, 2010, the Court of

Appeals reversed the circuit court and reinstated this Commission's decision.<sup>1</sup> The Court of Appeals issued its mandate on February 3, 2010. MREAC issued Funk a commercial appraiser's license on February 4, 2012.

On February 16, 2010, Funk, represented by counsel, filed a request for attorney fees and costs with this Commission. We dismissed that request for lack of jurisdiction on April 19, 2010. Funk sought review in the Henry County Circuit Court. On December 13, 2010, that court reversed our decision to dismiss and remanded the case to us with instructions to conduct a hearing on Funk's petition. We held a hearing on November 30, 2011. Edgett represented Funk. Assistant Attorney General Craig Jacobs represented MREAC. This case became ready for our decision on May 4, 2012, when the final written argument was received by this Commission.

### **Findings of Fact**

#### Findings of Fact from the Underlying Action

1. Funk earned a bachelor of science degree in business administration with a minor in financial management in 1980 from the University of California at Long Beach. He earned a juris doctorate from Western State University of Law at Fullerton, California, in 1983.
2. Since February 1, 2003, Funk has been employed at Whitlow Appraisals in Clinton, Missouri. From then until the end of 2006, Funk completed 810 residential appraisals for a total of 5,842 hours and 65 non-residential appraisals for a total of 1,637 hours. In 2007, Funk completed at least 150 appraisals of real estate.
3. Since July 2004, Funk has held a certificate as a certified residential real estate appraiser from MREAC.
4. In July 2006, Funk passed the examination to be a certified general real estate appraiser.

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<sup>1</sup> *Mo. Real Estate Appraisers Comm'n v. Funk*, 306 S.W.3d 101 (Mo. App. W.D. 2010).

5. On January 8, 2007, the MREAC received Funk's application to become a certified general real estate appraiser.
6. As of January 8, 2007, Funk had completed all the education, training and testing requirements for certification as a general real estate appraiser.
7. Funk completed an appraisal report for commercial property at 938 North 4th Street in Clinton in which he estimated an "as is" value as of March 8, 2007.
8. Funk completed an appraisal report for commercial property at 425 Pawnee Street in Clinton in which he estimated an "as is" value as of May 14, 2007.
9. Funk completed an appraisal report for commercial property at 32550 Hwy. MM in Warsaw in which he estimated an "as is" value as of December 21, 2007.
10. In each of these appraisal reports, Funk identified the ownership of the subject property; describes the subject property and the purpose of the report; sets forth a definition of market value; sets forth a definition and analysis for highest and best use; sets forth the exposure and marketing time estimates; describes the appraisal process and the scope of the appraisal; provides ownership and tax information and the legal description; describes the area in which the subject property is located, including maps, plats, and photographs; and describes the subject property and its improvements, including photographs.
11. In each of these appraisal reports, Funk calculates the market value of the subject property by using the cost approach, the income approach, and the comparable sales approach. At the end, Funk reconciles the three approaches to give a single estimate of the "as is" value of the subject property.
12. On August 14, 2007, the MREAC denied Funk's application because the MREAC found that Funk's appraisal reports on commercial property at 1038 & 1040 South Maguire in

Warrensburg did not meet the Uniform Standards of Professional Appraisal Practice (“USPAP”).

The Initial Action Before this Commission (No. 07-1550 RA)

13. On September 12, 2007, Funk appealed the denial to this Commission.
14. Funk represented himself before the Commission.
15. This Commission determined that, based on Funk’s 2007 appraisals, Funk met the statutory requirements to receive a commercial real estate appraiser’s license.
16. This Commission gave more weight to Funk’s 2007 appraisals than MREAC’s testimony about the 2006 appraisals.
17. This Commission granted Funk’s application.

Further Judicial Proceedings in Case No. 07-1550 RA

18. MREAC filed a petition for judicial review in the Cole County Circuit Court, case no. 08AC-CC00977.
19. Funk hired attorney Edgett to represent him in case no. 08AC-CC00977.
20. The Cole County Circuit Court reversed this Commission’s decision.
21. The Court of Appeals reversed the Cole County Circuit Court and reinstated this Commission’s decision.<sup>2</sup> The Court held that this Commission’s decision was supported by substantial evidence.
22. The Court of Appeals issued its mandate on February 3, 2010.
23. MREAC issued Funk a commercial appraiser’s license on February 4, 2012.

Facts Related to this Petition

24. At the time the underlying complaint was filed against Funk, his net worth did not exceed \$2,000,000.00.

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<sup>2</sup> *Mo. Real Estate Appraisers Comm’n v. Funk*, 306 S.W.3d 101 (Mo. App. W.D. 2010).

25. Edgett represented Funk during the time that the underlying petition was pending in the circuit court and the court of appeals as well as this petition.
26. Prior to February 28, 2009, Edgett charged Funk a total of \$5,262.50 in fees and costs. Due to the malfunction of Edgett's firm's billing software, that number cannot be broken down further between Edgett, his paralegal, and costs.
27. After February 28, 2009, Edgett worked a total of 54.5 hours on these cases. His paralegal worked a total of 10.5 hours on these cases.
28. Edgett's hourly rate at all times relevant to this petition was \$200 per hour. His paralegal's rate was \$85 per hour.
29. Funk incurred a total of \$804.92 in legal costs in the original action (07-1550 RA), the appeals from that decision, and this case.
30. Edgett hired an expert witness in the attorney fee case. The expert's fee was \$1,575.00, charged at a rate of \$250.00 per hour.
31. Funk's expert, retired judge Steve Angle, practiced as a general lawyer for ten years and spent twenty years on the bench as an associate circuit judge in Johnson County. Over those twenty years, he assessed attorney fees in divorces and probate cases.
32. Judge Angle has practiced law since 2006 in Johnson and Henry Counties. When Judge Angle resumed a private law practice in 2006, he researched what legal fees he should charge.
33. Judge Angle testified that Edgett's fees in this case, including the \$200.00 per hour rate, were reasonable.
34. No attorney in Johnson or Henry County charges \$75.00 per hour.
35. Attorneys from the metropolitan area around Kansas City charged much higher rates than attorneys in rural west central Missouri.

36. Judge Angle did not know of any attorneys in Johnson or Henry Counties that would take on an appeal for less than \$7,000.
37. Funk could not have utilized a Jefferson City attorney because the distance would have impaired the representation.
38. Edgett is the only attorney in Henry County qualified by expertise and experience to address the complex legal and factual issues in this case.
39. Funk's case is factually complex in the following ways:
- a. The underlying action was filed in 2007 and covered events that occurred in 2006;
  - b. There are a large number of exhibits in the underlying case, most dealing with the highly technical field of real estate appraisal;
  - c. The Uniform Standards of Professional Appraisal Practice (USPAP), which form the basis for appraisals in Missouri,<sup>3</sup> are a highly complex, convoluted, and often contradictory set of regulations that require expertise, experience, and knowledge of industry standards;
  - d. The issues on appeal were highly technical in nature; and
  - e. The case required experience in administrative law, appellate law, and civil procedure.
40. This case required specialized knowledge of appellate procedure and civil procedure in the review of administrative law as practiced by the specialized rules and regulations at this Commission. Edgett knew the rules of the Commission, the case law relating to those rules, and applied that expertise and knowledge in appeals of this Commission's

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<sup>3</sup> Section 339.532.2(7), RSMo Supp. 1012. Statutory citations are to the 2000 version of the Missouri Revised Statutes unless otherwise noted.

decision to the Circuit Court of Cole County, the Circuit Court of Henry County, and the Court of Appeals.

41. Edgett's knowledge of administrative law and particularly review of the Executive Branch decisions by the judiciary was particularly relevant and necessary in this case. The Cole County Circuit Court reversed this Commission's decision without reviewing the record and with no formal decision, which failed to meet the standards set out in law. But for an attorney with specialized experience and knowledge in judicial review of administrative petitions, Funk's rights would have been forfeited. Such knowledge and experience was essential to Funk in this case.

### **Conclusions of Law**

#### **I. Funk timely filed his petition**

MREAC contends that this petition is untimely because Funk did not file his application for attorney fees within thirty days of this Commission's decision in Funk's initial case. We reject this argument.

Section 536.087.3 states "a party seeking an award of fees and other expenses shall, within thirty days of a final disposition in an agency proceeding or final judgment in a civil action, submit to the court, agency or commission which rendered the final disposition or judgment an application ...." The statute sets two triggers for the thirty-day period: the "final disposition in the agency proceeding" and the "final judgment in a civil action."

In this case, MREAC filed a petition for judicial review and Funk then appealed the case to the Missouri Court of Appeals. "Generally, a decision of the appellate court is considered final at the time the mandate is issued."<sup>4</sup> Here, the Court of Appeals issued its mandate on

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<sup>4</sup> *Amburn v. Aldridge*, 296 S.W.3d 32, 34 (Mo.App. W.D. 2009), quoting *Meierer v. Meierer*, 876 S.W.2d 36, 37 (Mo.App. W.D. 1994).

February 3, 2010. Funk filed his application for attorney fees and costs on February 16, 2010, well within the thirty-day window. We conclude that Funk’s petition is timely.

## **II. Funk is entitled to fees and costs**

Section 536.087.1 states:

A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.

### **A. Agency Proceeding/Contested Case**

An agency proceeding is “an adversary proceeding in a contested case pursuant to this chapter in which the state is represented by counsel[.]”<sup>5</sup> A “contested case” is “a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing.”<sup>6</sup> The relevant inquiry is not whether the agency actually held an “adversary proceeding in a contested case,” but whether a statute, ordinance, or constitutional provision required the agency to do so.<sup>7</sup>

The “State” is “the state of Missouri, its officers and its agencies.”<sup>8</sup> MREAC is a state agency. The underlying case was one that Funk brought in order to seek a license. Section 621.045 requires that we determine such a case after an adversary hearing. An assistant attorney general represented MREAC in the underlying case. Therefore, the underlying case was a contested case and an agency proceeding.

### **B. Prevailing Party**

Section 536.085(2) defines a “party” to include:

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<sup>5</sup>Section 536.085(1).

<sup>6</sup>Section 536.010(2).

<sup>7</sup>*Lipic v. State*, 93 S.W.3d 839, 841 (Mo. App. E.D. 2002).

<sup>8</sup>Section 536.085(5).

(a) An individual whose net worth did not exceed two million dollars at the time the civil action or agency proceeding was initiated[.]

Funk's net worth at the time the Board filed the underlying complaint was within the amount that allows him to be a party in a fee proceeding.

Section 536.085(3) defines "prevails" as: "obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding[.]" In the underlying complaint, Funk requested a commercial real estate appraiser's license. We granted him that license. The Court of Appeals affirmed our decision. Clearly, Funk prevailed.

On the issue of whether Funk "obtained" the favorable result, the Court of Appeals has defined "obtained," as used in § 536.085(3), as: "'obtain,' in its simplest form, means 'to get possession of ... to arrive at; to reach; to achieve...'"<sup>9</sup> When the favorable result comes after the prevailing party has actively contested the agency's action, the prevailing party has "obtained" the favorable decision.<sup>10</sup>

Funk actively contested MREAC's decision to deny him a license by filing a complaint with this Commission and representing himself at a hearing. He then actively contested MREAC's attempts to overturn this Commission's decision by hiring counsel, defending in the Cole County Circuit Court, and taking an appeal to the Missouri Court of Appeals. Funk obtained the favorable result and qualifies as a prevailing party.

### **C. Substantially Justified**

A prevailing party is entitled to an award of attorney fees and expenses unless we determine that (1) the State's position was substantially justified or (2) special circumstances make an award unjust.<sup>11</sup> MREAC argues no "special circumstances" that would make an award

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<sup>9</sup>*Melahn v. Otto*, 836 S.W.2d 525, 529 (Mo.App, W.D. 1992), quoting Webster's Dictionary of the English Language, Unabridged 1236 (Encyclopedia Ed. 1977).

<sup>10</sup>*Id.*

<sup>11</sup>Section 536.087.1.

of attorney fees unjust, and we find none. Therefore, attorney fees and expenses are to be awarded unless the State's position was substantially justified.

Section 536.087.3 provides in part:

The fact that the state has lost the agency proceeding or civil action creates no legal presumption that its position was not substantially justified. Whether or not the position of the state was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by an agency upon which a civil action is based) which is made in the agency proceeding or civil action for which fees and other expenses are sought, and on the basis of the record of any hearing the court or agency deems appropriate to determine whether an award of reasonable fees and expenses should be made, provided that any such hearing shall be limited to consideration of matters which affected the agency's decision leading to the position at issue in the fee application.

MREAC must present a *prima facie* case that it had a reasonable basis in both fact and law for its position, and that this basis was not merely marginally reasonable, but clearly reasonable, although not necessarily correct.<sup>12</sup> MREAC must bear its burden based on the facts previously found in the underlying case and the additional information shown at the attorney fee hearing as to matters that led to its decision to file a petition for judicial review in the Cole County Circuit Court. We are not limited to considering the facts as determined in the underlying case. We may consider how these facts reasonably may have appeared to MREAC.<sup>13</sup> Bad faith is not a prerequisite to awarding fees.<sup>14</sup>

MREAC argues that it was substantially justified in appealing this Commission's decision because it "was warranted in proceeding to defend its position based on the opinion of its expert who substantiated the opinions of the MREAC itself."<sup>15</sup> We disagree. The law is very well-established that the courts are bound by credibility findings made by this Commission: courts "are not permitted to substitute [their] judgment for the judgment of the AHC on the

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<sup>12</sup>*Dishman v. Joseph*, 14 S.W.3d 709, 716-19 (Mo.App. W.D. 2000); *Joseph v. Dishman*, 81 S.W.3d 147, 153 (Mo.App. W.D. 2002).

<sup>13</sup>*Dishman*, 14 S.W.3d at 716, 718-19.

<sup>14</sup>*McMahon v. Mo. Dep't of Social Services*, 980 S.W.2d 120, 125-126 (Mo. App. E.D. 1998).

<sup>15</sup> MREAC's Proposed Findings of Fact, Conclusions of Law, and Order at ¶ 26.

credibility of witnesses.”<sup>16</sup> “The AHC ‘is the sole judge of the credibility of witnesses and the weight and value to give to the evidence.’”<sup>17</sup>

In Funk’s original licensing case, we found that Funk’s testimony about his 2007 appraisals was more credible than MREAC’s testimony regarding his 2006 appraisals, and we gave the 2007 appraisals more weight than the 2006 appraisals.<sup>18</sup> That credibility determination and the weighing of evidence are this Commission’s sole prerogatives. MREAC was not substantially justified in filing an appeal on these grounds. Such an appeal had no realistic chance of succeeding.

MREAC also submitted as findings of fact that Funk’s 2007 audits contained various errors and did not meet the Uniform Standards of Professional Appraisal Practice (“USPAP”).<sup>19</sup> We take this to be an additional argument that there was not sufficient evidence for this Commission to find in Funk’s favor.

MREAC cannot show that this position was substantially justified either. MREAC attempted to raise this argument in the Court of Appeals to no avail:

Though the MREAC also argues in this appeal that the 2007 appraisals do not meet USPAP standards, the MREAC did not object or otherwise raise this issue at the AHC hearing and, consequently, this issue is not preserved for appellate review. *City of Kansas City v. Chung Hoe Ku*, 282 S.W.3d 23, 28 (Mo.App. W.D. 2009).[<sup>20</sup>]

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<sup>16</sup> *Funk*, 306 S.W.3d at 107. See also *Department of Social Services v. Peace of Mind Adult Day Care Center*, 377 S.W.3d 631, 638 (Mo.App. W.D. 2012); *Kerwin v. Missouri Dental Bd.*, 375 S.W.3d 219, 225 (Mo.App. W.D. 2012); *Koetting v. State Bd. of Nursing*, 314 S.W.3d 812, 815 (Mo.App. W.D. 2010); *Larocca v. State Bd. of Registration for Healing Arts*, 897 S.W.2d 37, 45 (Mo.App. E.D. 1995); *Monia v. Melahn*, 876 S.W.2d 709, 711 (Mo.App. E.D. 1994); *Biggs v. Missouri Comm’n on Human Rights*, 830 S.W.2d 512, 518 (Mo.App. E.D.1992); *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 304 (Mo.App. E.D. 1986).

<sup>17</sup> *Funk*, 306 S.W.3d at 105, quoting *Clayton v. Langco Tool & Plastics, Inc.*, 221 S.W.3d 490, 493 (Mo.App. S.D. 2007).

<sup>18</sup> *Funk v. Mo. Real Estate Appraisers Comm’n*, no. 07-1550 RA (Mo. Admin. Hrg. Comm’n, Nov. 5, 2008) (slip op. at 5-6).

<sup>19</sup> MREAC’s Proposed Findings of Fact, Conclusions of Law, and Order at ¶¶ 21-23.

<sup>20</sup> *Funk*, 306 S.W.3d at 106 n.5.

The Missouri Supreme Court has held that “an issue that was never presented to or decided by the trial court is not preserved for appellate review.”<sup>21</sup> Missouri appellate courts may, in their discretion, review unpreserved claims for “plain error.”<sup>22</sup> When an appellate court uses its discretion to review a claim for plain error, the court determines whether, on the face of the petition, there are “substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice.”<sup>23</sup> In light of this stringent standard, as well as the Court of Appeals’ refusal to even consider plain error review in Funk’s appeal, we conclude that there was no substantial justification for MREAC to raise this claim on appeal.

#### **D. The amount of attorney fees**

Section 536.087.1 requires that Funk “shall be awarded those reasonable fees and expenses incurred by that party in the ... agency proceeding[.]” Funk seeks fees and costs for his defense of his case in the Cole County Circuit Court and the Missouri Court of Appeals as well as in this action. The Missouri Court of Appeals has held that a petitioner may seek fees and costs incurred in these actions: “Section 536.087 ... provides compensation to a prevailing party in an action against the state for all aspects of a litigation with the state, including fees and expenses incurred in seeking fees, if the state’s position in the action was not substantially justified.”<sup>24</sup>

Section 536.085(4) provides:

(4) “**Reasonable fees and expenses**” includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court or agency to be necessary for the preparation of the party’s case, and reasonable attorney or agent fees. The amount of fees awarded as reasonable fees and expenses shall be based upon prevailing market

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<sup>21</sup> *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2000).

<sup>22</sup> *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 809 (Mo. banc 2011).

<sup>23</sup> *Id.*, quoting *In re R.S.L.*, 241 S.W.3d 346, 351 (Mo.App. W.D. 2007).

<sup>24</sup> *Hernandez v. State Bd. of Registration for Healing Arts*, 936 S.W.2d 894, 902 (Mo.App. W.D. 1997).

rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the state in the type of civil action or agency proceeding, and attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]

Funk requests an award of \$17,055.00 for attorney fees, as well as costs in the amount of \$804.92. Edgett's hourly billing rate is \$200.00. Edgett worked 54.5 hours on Funk's case after March 18, 2009. Edgett's paralegal worked 10.5 hours on Funk's case. Her billing rate is \$85.00 per hour.

Edgett billed Funk \$5,262.50 for work done before March 18, 2009. Edgett's billing software malfunctioned and he cannot break that total down between his time, his paralegal's time, and costs.<sup>25</sup> Because we find that Funk is entitled to the requested rate of \$200.00 per hour (and \$85.00 per hour for his paralegal), we need not break the \$5,262.50 figure down further.

Section 536.085(4) caps the hourly rate at \$75.00 per hour unless Funk can show a "special factor." Funk argues that he is entitled to a higher rate because no attorney would represent him in this case for \$75.00 per hour.<sup>26</sup>

Funk's argument that no attorney would represent him for \$75.00 does not, by itself, constitute a special factor.<sup>27</sup> However, this case sets out factors allowing a higher hourly rate. Judge Angle testified that no attorney in Henry or Johnson Counties would accept an hourly rate of \$75.00 per hour. Further, no attorney in Henry or Johnson Counties would accept an appeal for under \$7,500.00—far more than the \$4,365 that Edgett charged in this case.<sup>28</sup> Funk's

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<sup>25</sup> Tr. 55.

<sup>26</sup> Petitioner's Brief, Proposed Findings, Conclusions, and Decision at ¶4.

<sup>27</sup> *Sprenger v. Missouri Dept. of Public Safety*, 340 S.W.3d 109, 113 (Mo.App. W.D. 2010).

<sup>28</sup> Tr. 70.

inability to find an attorney to represent him for \$75.00 per hour is not dispositive, but we accord it great weight.

This case was not a simple proceeding before this Commission. Instead, this case required defending this Commission's decision in the Cole County Circuit Court, taking an appeal to the Missouri Court of Appeals, instituting the attorney fee action, and taking an appeal of this Commission's initial decision to the Henry County Circuit Court. Thus, this case required specialized knowledge of administrative law, judicial review of this Commission's decisions, appellate law, and civil procedure. These areas together constitute a discrete set of skills that were essential to Funk in this case. Edgett possessed all of these skills, experience, and knowledge and used them to advocate Funk's case and eventually to prevail. Edgett was the only attorney in Henry County who possessed these skills, knowledge, and experience.

Further, real estate appraisal is a specialized field in and of itself. We find the USPAP standards to be subjective, malleable, and nearly impossible to employ in a consistent manner. After having reviewed real estate appraiser cases for many years, this Commission is of the opinion that an appraiser could be cited for a violation of the USPAP in every appraisal that he or she has ever done. In a fluid area of fact and law such as real estate appraisal, expertise such as Edgett brought to Funk's case is essential.<sup>29</sup>

We find that Funk's requested rates of \$200 per hour for attorney time and \$85 per hour for paralegal time in this case is reasonable for a total of \$17,055.00 in attorney fees.

Edgett testified that Funk incurred \$804.92 in costs. Funk's expert witness fee in this proceeding was \$1,575.00. Funk is therefore entitled to \$2,379.92 in costs.

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<sup>29</sup> We consider very relevant that Funk himself graduated from law school, became a licensed lawyer in California, and determined that he could not handle this case.

### **Conclusion**

Funk is entitled to an award of attorney fees and reasonable expenses because he is the prevailing party in the underlying case and the Board failed to prove that its position was substantially justified. Funk is entitled to \$17,055.00 in attorney fees and \$2,379.92 in costs.

SO ORDERED on September 10, 2013.

\s\ Nimrod T. Chapel, Jr.  
NIMROD T. CHAPEL, JR.  
Commissioner